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No.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1995

U.S. EX REL. ROLAND A. LEBLANC,
Petitioner,

v.

RAYTHEON COMPANY, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT.

PETITION FOR A WRIT OF CERTIORARI

ROBERT DOUGLAS CITY
Counsel of Record
PHILIP DI DOMENICO
CITY, HAYES, MEAGHER &
DISSETTE, P.C.
50 Congress Street
Boston, Massachusetts 02109
(617) 523-3050

Counsel for Petitioner

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

40PP

Questions Presented.

This case concerns the limits of subject matter jurisdiction under the special jurisdictional provisions of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). Petitioner Roland A. LeBlanc ("LeBlanc") brought a *qui tam* action against Respondent Raytheon Company, Inc. ("Raytheon") alleging that Raytheon knowingly failed to test the Patriot Missile Defense System ("Patriot"), falsified or concealed test result records, delivered and received payment for untested and/or defective weapons, violated the quality assurance provisions of its contracts with the government in regard to the Patriot, and exaggerated Patriot's performance in the Persian Gulf War in order to cover up its false claims. The district court dismissed the case for lack of subject matter jurisdiction under § 3730(e)(4)(A) finding that allegations of Raytheon's fraud already were disclosed publicly and that LeBlanc's action was based upon such disclosures. The First Circuit summarily affirmed the district court.

The questions presented are:

I. Did the publication of certain allegations of possible defects in Patriot constitute a public disclosure within the meaning of § 3730(e)(4)(A) of the False Claims Act so as to bar jurisdiction?

II. Was LeBlanc's False Claims Act suit based upon publicly disclosed allegations or transactions because LeBlanc used certain publicly disclosed allegations of defects in the Patriot to initiate his investigation into Raytheon's possible fraud?

Table of Contents.

Questions Presented	i
Table of Contents	ii
Table of Authorities Cited	iii
Opinions Below	1
Jurisdiction	2
Statutory Provisions Involved	2
Statement of the Case	2
Course of Proceedings and Disposition Below	5
Reasons for Granting the Writ	7
Argument	7
I. The Court of Appeals' Summary Affirmation of the District Court's Interpretation of § 3730(e)(4)(A) of the False Claims Act Conflicts with the Interpretation of Five Other Courts of Appeals	7
A. The Court of Appeals Erred in Affirming the District Court's Holding that Allegations of Raytheon's Fraud Were Disclosed Publicly Prior to LeBlanc's Action	11
B. The Court of Appeals Erred in Affirming the District Court's Holding that LeBlanc's Action was Based Upon Publicly Disclosed Allegations of Patriot's Defects	15
II. The Court of Appeals' Summary Affirmation of the District Court's Interpretation of § 3730(e)(4)(A) of the Faise Claims Act Is a Decision on an Important Question of Federal Law and This Court Should Resolve the Conflict Among the Circuits As to the Scope of the Jurisdictional Bar in *Qui Tam* Actions	17
Conclusion	20
Appendix	1A

Table of Authorities Cited.

CASES.

Cooper v. Blue Cross and Blue Shield of Florida, 19 F.3d 562 (11th Cir. 1994) 9n, 14

Houck on behalf of U.S. v. Folding Carton Admin., 881 F.2d 494 (7th Cir. 1989) 8n, 9n

U.S. ex rel. Dick v. LILCO, 912 F.2d 13 (2d Cir. 1990) 8n

U.S. ex rel. Doe v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992) 8n, 16n

U.S. ex rel. Kreindler v. United Technologies, 985 F.2d 1148 (2d Cir. 1993) 8n, 16n

U.S. ex rel. LaValley v. First Nat. Bank of Boston, 707 F.Supp. 1351 (D.Mass. 1988) 10, 11, 16, 18

U.S. ex rel. Lindenthal v. General Dynamics Corporation, 1995 WL 453279 (9th Cir. Cal.) 9n, 15

U.S. ex rel. Marcus v. Hess, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943) 8, 11, 18

U.S. ex rel. Precision Co. v. Koch Industries, 971 F.2d 548 (10th Cir. 1992) 8n, 9n, 16n

U.S. ex rel. Rabushka v. Crane Co., 40 F.3d 1509 (8th Cir. 1994) 9n, 14, 15

U.S. ex rel. S. Prawer v. Fleet Bank, 24 F.3d 320 (1st Cir. 1994) 8n, 10, 11

U.S. ex rel. Siller v. Becton, Dickenson & Co., 21 F.3d 1339 (4th Cir. 1994) 9n, 16

U.S. ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994) 9n, 12, 13, 14, 18

U.S. ex rel. State of Wisconsin v. Dean, 729 F.2d 1100 (7th Cir. 1984) 19

U.S. ex rel. Stinson v. Prudential Ins., 944 F.2d 1149 (3d Cir. 1991) 8, 9n

Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) 13

TABLE OF AUTHORITIES CITED (CONT'D)

STATUTES AND RULES.

United States Code

28 U.S.C. § 1254 2
31 U.S.C. § 3729 2
31 U.S.C. § 3730 *passim*
31 U.S.C. § 3732 2
31 U.S.C. § 3733 2

MISCELLANEOUS.

Legislative History of the False Claims Amendment Act, S. Rep. No. 345, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S.C.C.A.N. at 5288-89 8n, 18n, 19

Military Specification MIL-Q-9858A 3

Oparil, *The Coming Impact of the Amended False Claims Act*, 22 Akron L. Rev. 525 (1989) 8

Webster's New Collegiate Dictionary (1981) 17

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PETITION FOR A WRIT OF CERTIORARI

Roland A. LeBlanc ("LeBlanc") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The unpublished opinion of the court of appeals is reprinted in the Appendix, *infra*, pp. 1A-2A. The unpublished opinion of the district court is reprinted at App., *infra*, pp. 3A-14A.

Jurisdiction

The court of appeals entered its judgment on August 9, 1995. This Court has jurisdiction to review the judgment by writ of certiorari under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The statute involved is 31 U.S.C. § 3730(e)(4)(A).

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

Statement of the Case

Federal jurisdiction in the district court was based on the "*qui tam*" provisions of the False Claims Act, 31 U.S.C. §§ 3729-33 ("FCA"), which provide, generally, that any person may bring a civil action for a violation of § 3729 on behalf of the claimant individually and on behalf of the United States Government in any judicial district in which the defendant transacts business. *See* 31 U.S.C. §§ 3730(b)(1) and 3732(a).

LeBlanc's action alleges, *inter alia*, that Raytheon knowingly violated its contracts with the United States Government ("government") by failing to test the Patriot Missile Defense System ("Patriot"), falsifying or concealing test result records, delivering and receiving payment for defective weapons systems, and exaggerating Patriot's performance in the Persian Gulf War in order to cover up its false claims.

Following the end of Operation Desert Storm in February, 1991, a public debate ensued regarding the effectiveness of Patriot. Examples of this debate are contained in newspaper and magazine articles, transcripts of Congressional hearings, Government Accounting Office reports and other publications. Critics of Patriot alleged that Patriot was defective and contributed to American deaths, and that Raytheon exaggerated Patriot's success rate. Raytheon has denied the allegations of failure, and consistently has claimed high success rates for the weapon system.

In March, 1992, LeBlanc began to investigate Raytheon's conduct in connection with the sale of Patriot to the government to determine whether Raytheon had any contractual liability for the reported failure of Patriot. There had been no public disclosures of any contractual liability. LeBlanc first sought to verify the reports of Patriot's failure and the nature of the alleged failures to determine whether these failures may have been due to poor design and/or production defects on the part of Raytheon or failure on the part of Raytheon to adhere to its contract requirements to test rigorously each component of the weapons system to assure that performance met contract standards.

Pursuant to his investigation, LeBlanc conferred with and obtained previously undisclosed documents from Drs. Theodore A. Postol, George Lewis and Reuven Pedatzur of the Massachusetts Institute of Technology. These documents suggested to LeBlanc that Raytheon may have defrauded the government in connection with the sale of Patriot. LeBlanc had extensive experience with the administration of defense contracts, including the application of military specifications and standards such as MIL-Q-9858A, Quality Program Requirements. MIL-Q-9858A, among other specifications, applies to the Patriot contract. The contract specifications require, *inter alia*, that Raytheon administer exhaustive testing and quality

control procedures and deliver Patriot free of defects. Pursuant to his investigation, LeBlanc read military specifications and standards, Defense Logistics Agency and Department of Defense directives, and government training materials. LeBlanc's research led him to conclude that Raytheon had violated the testing and quality assurance provisions of the Patriot contracts by failing to discover the "range gate" software defect before delivery of the Patriot to the government. This defect caused the weapon to misidentify the direction of an approaching enemy missile when the weapon system had been allowed to remain operational for an extended period of time so that when launched under these conditions it would set itself a course which diverged from the attacking missile and would not destroy it.

Pursuant to LeBlanc's own investigation of Patriot's defects, including communications with personnel working at the government's Redstone Arsenal, LeBlanc discovered that Patriot's range gate defect had existed at least since 1985. Drawing upon his experience and knowledge, the information he himself uncovered, and a careful analysis of military specifications and standards, Defense Department directives and other materials, LeBlanc determined that had Raytheon tested Patriot's guidance software in accordance with its contract requirements it would have identified and corrected the range gate shift defect long before the Gulf War. LeBlanc concluded that Raytheon violated the testing requirements of its contracts and committed fraud on the government.

LeBlanc continued to communicate with Drs. Postol, Lewis and Pedatzur, among others. These communications led LeBlanc to discover that the Patriot had other defects in addition to the "range gate shift" defect. In June, 1993, LeBlanc obtained non-public evidence to suggest that additional problems in Patriot had affected the weapon's performance in the Persian Gulf War including the "fuse beam limitation". The missile was

"blind" in front and was able to detect an enemy missile only as the two missiles drew along side each other. This defect made it impossible for Patriot to locate and identify enemy missiles having the speed of those used by the Iraqi forces with sufficient advanced time to permit an effective detonation of its antimissile payload; rather the detonation of the payload occurred after the enemy missiles had moved out of range. From this evidence, LeBlanc concluded that this failure also was the result of Raytheon's failure to comply with military specifications in Patriot contracts. This evidence was corroborated in non-public telephone interviews which LeBlanc conducted in his continuing investigation. The evidence which LeBlanc uncovered showed the Patriot missiles largely ineffective against incoming tactical ballistic missiles of the type used by the enemy in the Gulf War, that Raytheon knew or should have known of these defects and limitations prior to the Gulf War, that Raytheon either failed to test Patriot or failed to report negative test results to the government, that Raytheon failed to correct the defects before delivery, and that Raytheon attempted to conceal these facts from the government.

Although the public debate over the effectiveness of Patriot in the Gulf War has continued to this day, LeBlanc is the only person to have alleged that Raytheon submitted false claims to the government for Patriot by failing adequately to test the weapons in violation of the quality assurance specifications contained in the Patriot contracts. Raytheon has conceded, and the district court found, that no allegations of Raytheon's contract violations were disclosed publicly prior to LeBlanc's action.

Course of Proceedings and Disposition Below

LeBlanc brought this action under seal on October 20, 1992. In compliance with the notification provision contained in 31

U.S.C. § 3730(b)(2), LeBlanc served the government with a copy of the Complaint along with a written statement of the nature and operation of the fraud. LeBlanc filed his Amended Complaint and second statement of evidence on July 13, 1993.

The government declined to intervene on January 28, 1994. On January 31, 1994, the district court granted LeBlanc's Motion to Remove Seal and for Leave to Serve Defendant. On May 17, 1994, Raytheon filed its Suggestion of Lack of Subject Matter Jurisdiction ("Suggestion"). On September 19, 1994, the stay terminated and the district court set a schedule for LeBlanc's opposition to and a hearing on Raytheon's Suggestion, for Raytheon's Answer to the Amended Complaint, and for discovery in two phases; the first being limited to the issue of subject matter jurisdiction.

Pursuant to the district court's scheduling order, on September 29, 1994, LeBlanc filed his Opposition to Raytheon's Suggestion and, on the same date, Raytheon filed its Motion to Dismiss. LeBlanc filed his Opposition to Raytheon's Motion to Dismiss on October 13, 1994. Raytheon deposed LeBlanc on October 11, 12, 18 and 25, 1994. On November 3, 1994, Raytheon filed its Supplemental Filing in Support of its Suggestion ("Supplemental Filing"). On November 17, 1994, LeBlanc filed his Reply to Raytheon's Supplemental Filing ("Reply") and his Memorandum of Law in Support of LeBlanc's Opposition to Raytheon's Motion to Dismiss. Raytheon filed its Response to LeBlanc's Reply on November 23, 1994. On November 28, 1994, the district court heard oral argument on Raytheon's Suggestion and LeBlanc's Opposition.

On January 26, 1995, the district court dismissed LeBlanc's action for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A). LeBlanc filed his Motion for Reconsideration on February 9, 1995 which the Court denied on March 3, 1995. Thereafter, LeBlanc appealed the decision to the United States Court of Appeals for the First Circuit on March 8, 1995.

On August 9, 1995, the court of appeals summarily affirmed the district court's judgment.

Reasons for Granting the Writ

In direct conflict with five other circuits, the First Circuit has found subject matter jurisdiction of a *qui tam* suit to be barred even though no allegations of fraud were disclosed publicly prior to initiation of the action. The First Circuit came to this conclusion in spite of the plain language of the statute which limits the applicability of the jurisdictional bar to instances in which each of the following criteria have been met: (i) prior to the *qui tam* plaintiff's action, there has been a public disclosure of allegations or transactions of fraud; and (ii) the *qui tam* action was based upon the public disclosures.

The First Circuit's decision effectively closes the door to all *qui tam* plaintiffs except those who qualify as an "original source" exception to the jurisdictional bar; those plaintiffs with "direct and independent" knowledge of fraud. To allow the exception to swallow the rule in this manner will frustrate Congressional efforts to broaden *qui tam* jurisdiction.

I. The Court of Appeals' Summary Affirmation of the District Court's Interpretation of § 3730(e)(4)(A) of the False Claims Act Conflicts With the Interpretation of Five Other Courts of Appeals.

Since the 1986 amendments to the FCA, the courts' interpretations of the newly drafted jurisdictional bar have evolved from broad applications of the bar to increasingly narrow applications. The effect has been to encourage such actions. The first cases to reach appeal after the 1986 amendments took effect were

decided in the Second,[1] Third,[2] Seventh[3] and Tenth[4] Circuits. The courts' reasoning in these cases reveals the conflict resulting from Congress' attempt to strike a middle ground:

> . . . to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness represented by the *Marcus*[5] decision, and the restrictiveness of the post-1943 cases . . .

U.S. ex rel. Stinson, 944 F.2d at 1154. Although the principal intent in amending the *qui tam* section of the FCA was "to encourage more private enforcement suits,"[6] the statute was drafted so as to bar purely "parasitic" suits. *See* Oparil, *The Coming Impact of the Amended False Claims Act*, 22 Akron L. Rev. 525, 535 (1989). The resulting language of the jurisdictional bar attempts to combine and harmonize these two purposes as follows:[7]

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, un-

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[1] *U.S. ex rel. Dick* v. *LILCO*, 912 F.2d 13 (2d Cir. 1990); *U.S. ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *U.S. ex rel. Kreindler* v. *United Technologies*, 985 F.2d 1148 (2d Cir. 1993).

[2] *U.S. ex rel. Stinson* v. *Prudential Ins.*, 944 F.2d 1149 (3d Cir. 1991).

[3] *Houck on behalf of U.S.* v. *Folding Carton Admin.*, 881 F.2d 494 (7th Cir. 1989).

[4] *U.S. ex rel. Precision Co.* v. *Koch Industries*, 971 F.2d 548 (10th Cir. 1992).

[5] *U.S. ex rel. Marcus* v. *Hess*, 317 U.S. 537, 63 S.Ct. 379, 87 L.Ed. 443 (1943).

[6] S. Rep. No. 345, 99th Cong., 2d Sess. 13, *reprinted in* 1986 U.S. Code Cong. & Admin. News 5288-89.

[7] *U.S. ex rel. S. Prawer* v. *Fleet Bank*, 24 F.3d 320, 322 (1st Cir. 1994).

> less the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C. § 3730(e)(4)(A). In each of these early cases, the court made a factual finding based on ample evidence in the record that a public disclosure of the plaintiff's allegation had occurred.[8] None of these cases dealt with the issue in the present case, namely, whether a public disclosure of defective performance of a weapons system constitutes a public disclosure of fraud.

In 1994 and 1995, FCA jurisdictional bar cases were decided in the Fourth,[9] Eighth,[10] Ninth,[11] Eleventh[12] and District of Columbia[13] Circuits. These cases interpret the bar in such a way as to effectuate that aspect of the legislative intent which is to encourage more private *qui tam* law suits. In the instant case, the court of appeals' summary affirmation of the district court's decision is in direct conflict with the holdings of these recent cases.

As a prelude to the current trend to interpret the bar narrowly and thus to encourage *qui tam* suits, one of the first *qui tam* cases decided after the 1986 amendments was in the Massachusetts District Court. The case sought to open the door to more

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[8] *E.g., Houck on Behalf of U.S.*, 881 F.2d at 504 (finding that information in complaint was publicly disclosed in prior proceeding); *U.S. ex rel. Stinson*, 944 F.2d at 1160 (finding that plaintiff acquired information in complaint from discovery material in another case); *U.S. ex rel. Precision*, 971 F.2d at 553 (finding that plaintiff's allegations were disclosed publicly in three prior law suits and a congressional hearing).

[9] *U.S. ex rel. Siller* v. *Becton, Dickenson & Co.*, 21 F.3d 1339 (4th Cir. 1994).

[10] *U.S. ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509 (8th Cir. 1994).

[11] *U.S. ex rel. Lindenthal* v. *General Dynamics Corporation*, 1995 WL 453279 (9th Cir. Cal.).

[12] *Cooper* v. *Blue Cross and Blue Shield of Florida*, 19 F.3d 562 (11th Cir. 1994).

[13] *U.S. ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994).

qui tam suits. In *U.S. ex rel. LaValley* v. *First Nat. Bank of Boston*, 707 F.Supp. 1351 (D.Mass. 1988), the court stated:

> The new amendments were designed to encourage more private enforcement suits . . . the legislative history in both houses of Congress reveals a sense that fraud against the Government is so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud.

Id. at 1355. The court separated its interpretation of the statute into a three-step analysis: "this court must determine whether: (1) there has been a public disclosure within the meaning of the statute; (2) if so, whether the relator based his suit on the public disclosure; and (3) if so, whether the relator is an original source of the information." *Id.* at 1366.[14] This enlightened approach to an analysis of the bar, not to be used by a majority of the circuits until six years later, was reiterated in a 1994 First Circuit case which was ignored by the district court and by the court of appeals in the case at bar. In *U.S. ex rel. S. Prawer and Co.* v. *Fleet Bank*, 24 F.3d 320 (1st Cir. 1994), the court stated,

> Clearly, the 1986 amendments, insofar as they were responding to a regime in which the preclusion of opportunistic litigation was too heavily weighted, had as perhaps their central purpose an expansion of the opportunities and incentives for private citizens with knowledge of fraud against the government to come forward with that information.

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[14] In applying the first step of the analysis, the *LaValley* court found (and the plaintiff conceded) that the plaintiff's allegations were disclosed publicly in a prior proceeding and, therefore, the *LaValley* court did not reach the issue presented in the present case. *U.S.* v. *LaValley*, 707 F.Supp. at 1366.

Id. at 327. In stark contrast with the decisions of the district court and the court of appeals in the present case, the *Prawer* court enunciated the narrowest interpretation of the bar to date, opening the door to private *qui tam* plaintiffs wider than any other circuit. The *Prawer* court held that, even if the government had notice of allegations or transactions giving rise to a *qui tam* suit, such notice would not trigger the jurisdictional bar, and that only "parasitic" suits, those which have no potential to provide a "useful or proper return" to the government, are barred. *Id.* at 329; *see U.S. ex rel. Marcus*, 317 U.S. at 545.

A. *The Court of Appeals Erred in Affirming the District Court's Holding that Allegations of Raytheon's Fraud Were Disclosed Publicly Prior to LeBlanc's Action.*

The district court found under 31 U.S.C. § 3730, and the court of appeals affirmed, that allegations of the making of false claims by Raytheon had been publicly disclosed as of the time of filing of the amended complaint. App., *infra*, p. 10A. The court's conclusion is based on its finding that "*every* defect and failure of the Patriot alleged by LeBlanc in the amended complaint had been disclosed publicly before the present action was filed." App., *infra*, p. 8A. The fact that allegations of Patriot's defects were disclosed publicly is undisputed: LeBlanc has conceded this point. What is disputed, and the issue presented by this Petition, is whether a public disclosure of defects constitutes a public disclosure of false claims. The district court and court of appeals refused to acknowledge the distinction, and an examination of the case law directly on point demonstrates that their decisions barring this action must be reversed.

The district court's ruling that, because allegations of Patriot's defects were disclosed publicly, allegations of Raytheon's false claims also were disclosed, ignores the holdings in five

other circuits [13] which distinguish between the public disclosure of "allegations" and the public disclosure of "allegations of fraud." In *U.S. ex rel. Springfield Terminal Ry.* v. *Quinn*, 14 F.3d 645 (D.C. Cir. 1994), and in every *qui tam* jurisdictional case decided since, the courts have barred *qui tam* actions only where there has been a public disclosure of *allegations of fraud*. If the information in the public domain does not "rise to the level of an allegation or transaction of fraud," the suit is not barred. *Id.* at 655. Applying this holding to the facts of the present case, the information which was disclosed publicly prior to LeBlanc's action *did not* rise to the level of allegations or transactions of fraud, and the district court failed even to address this issue.

In *Springfield*, the *qui tam* plaintiff obtained public telephone records which he believed indicated fraud on the part of the defendant. The defendant moved to dismiss under § 3730(e)(4)(A), stating that the action was based upon the disclosure of the public telephone records. The district court dismissed the suit. On appeal, the court of appeals found that in dismissing the plaintiff's suit, the district court wrongly had assumed that the public telephone records constituted "allegations or transactions of fraud". *Id.* at 656. The circuit court reversed and remanded, stating:

> At most, the records provided a convenient vehicle by which Springfield, already suspicious because of its personal experience with the arbitration, could pursue its independent investigation.

Id. at 656. Similarly in the present case, the public information about Patriot's defects provided a point of departure from which LeBlanc, already suspicious from viewing televised re-

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[13] *Supra*, notes 9-13.

ports of Patriot engagements and from his personal experience working for the government and at Raytheon, could pursue his independent investigation.

> Courts sometimes speak loosely of barring a *qui tam* suit because it is based upon "publicly disclosed information". But the Act bars suits based on "publicly disclosed allegations or transactions", not information.

Id. at 653; *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). Raytheon submitted hundreds of documents to the district court which chronicle the public debate about Patriot's performance in the Gulf War, but none of them contains any mention of false claims or fraud by Raytheon. The documents contain information about alleged defects, not allegations of fraud as set forth in LeBlanc's Complaint.

> We too find a distinction between "allegations or transactions" and ordinary "information" as a matter of common usage and sound interpretation of the FCA . . . the only public information considered by the district court was not in and of itself sufficient to constitute "allegations or transactions" of fraudulent conduct within the meaning of the FCA jurisdictional bar.

U.S. ex rel. Springfield Terminal Ry., 14 F.3d at 653. The language of § 3730(e)(4)(A) is designed to prohibit *qui tam* actions only when either the allegation of fraud or the critical elements of fraudulent transactions themselves were in the public domain. *Id.* at 654. The critical elements of the fraudulent transaction are not, as Raytheon argues, that the Patriot may have contained defects. The critical elements of Ray-

theon's fraudulent acts alleged by LeBlanc are that Raytheon failed adequately to test the Patriot under its contract and subsequently failed to discover and correct defects in the Patriot. Raytheon admits that these critical elements were not previously disclosed. App., *infra*, p. 9A.

Two months after the *Springfield* decision, the Eleventh Circuit decided *Cooper* v. *Blue Cross and Blue Shield of Florida*, 19 F.3d 562 (11th Cir. 1994). The *Cooper* court held that a publicly disclosed GAO report criticizing the *qui tam* defendant's method of monitoring payments to hospitals under the Medicare Secondary Payer Laws and accusing the defendant of a conflict of interest did not constitute an allegation that the defendant had engaged in wrongdoing. *Cooper*, 19 F.3d at 567. The court stated that the GAO report, therefore, was not a "public disclosure of allegations or transactions that the defendant knowingly violated the Medicare laws." *Id.* In the present case, the allegations of defects in Patriot do not constitute an allegation that Raytheon actually engaged in wrongdoing, and they are not public disclosures of allegations or transactions that Raytheon knowingly violated its contracts. The district court erred in concluding that a public disclosure occurred.

The narrow view of the jurisdictional bar held in *Springfield* and *Cooper* was embraced by the Eighth Circuit in *U.S. ex rel. Rabushka* v. *Crane Co.*, 40 F.3d 1509 (8th Cir. 1994). The Eighth Circuit stated, "We agree with *Springfield* that the essential elements exposing the transaction as fraudulent must be disclosed publicly as well." *Id.* at 1512. The court held that publicly disclosed newspaper articles describing the defendant's "unfunded pension woes" did not raise the inference that the defendant intentionally and fraudulently understated the pension problem in an attempt to avoid liability. *Id.* The court held that the plaintiff's action alleging the defendant's fraud in understating the pension problem was not barred. *Id.* at

1513. In the present case, the publicly disclosed allegations of defects do not raise an inference that Raytheon intentionally and fraudulently failed to test the Patriot, violated its contracts or made false claims, and LeBlanc's action which alleges such fraud by Raytheon should not be barred.

In August, 1995, the Ninth Circuit decided *U.S. ex rel. Lindenthal* v. *General Dynamics Corporation*, 1995 WL 453279 (9th Cir. Cal.). The court held that publicly disclosed allegations of defects do not constitute publicly disclosed allegations of fraud under the jurisdictional bar. *Id.* at 6. Citing *Rabushka*, the court stated that a publicly disclosed letter which alleged defective specifications but which did not allege that the inadequacies stemmed from any fraud did *not* constitute a public disclosure under 31 U.S.C. § 3730(e)(4)(A). *Id.* The court also held that a publicly disclosed government report which alleged "difficulties" and "problems" which the defendant defense contractor was having with its Air Force radar system was *not* tantamount to a disclosure that the contractor committed fraud. *Id.* Applying the *Lindenthal* holding to this case, the publicly disclosed allegations of defects in Patriot did *not* constitute a public disclosure within the meaning of 31 U.S.C. § 3730(e)(4)(A).

B. *The Court of Appeals Erred in Affirming the District Court's Holding that LeBlanc's Action was Based Upon Publicly Disclosed Allegations of Patriot's Defects.*

As discussed above, five circuit courts recently have interpreted narrowly the jurisdictional bar, and several holdings on four corners with the facts in the present case directly are opposed to the First Circuit's decision here. For these reasons alone, the court of appeals must be reversed. In the alternative, even if the public disclosure of defects in Patriot somehow is construed as a public disclosure of fraud, LeBlanc's action still

should be allowed to proceed because his action was not actually "based upon" the public disclosures of defects. *U.S. ex rel. LaValley*, 707 F.Supp. at 1366.

Assuming that the disclosures of allegations of defects in Patriot constituted a public disclosure of fraud by Raytheon, the district court then concluded that LeBlanc's action was "based upon" those disclosures.[16] The district court's conclusion is based on its interpretation of "based upon" which conflicts with the Fourth Circuit's interpretation and with the less restrictive view of the jurisdictional bar held by every other circuit court to have decided the issue. The district court, misapplying the Fourth Circuit's definition of "based upon" in *U.S. ex rel. Siller* v. *Becton Dickinson Co.*, 21 F.3d 1339, 1349 (4th Cir. 1994), held that LeBlanc "actually derived" his allegations of fraud from the public disclosures of defects because LeBlanc used the information about defects as a "point of departure" for his investigation into Raytheon's possible fraud. App., *infra*, p. 13A. LeBlanc's use of the allegations of defects as a "point of departure" for his investigation does not mean, however, that he "actually derived" his action from those allegations. The *Siller* court correctly noted that "actually derived" is *not* defined as "to use as a point of departure".[17] Rejecting previous courts' definitions of "based upon", the *Siller* court held that the correct definition is "actually derived from". *Id.* at 1348.

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[16] The above argument and authorities show the district court's conclusion that a public disclosure occurred to have been in error, and LeBlanc denies that a public disclosure of fraud occurred.

[17] The Siller court explicitly stated that "based upon" does not mean "supported by", *compare U.S. ex rel. Precision* v. *Koch Industries, Inc.*, 971 F.2d 548, 552 (10th Cir. 1992), and explicitly rejected earlier *qui tam* holdings that an action was "based upon" a public disclosure whenever the factual basis for the action had been disclosed in the public domain. *U.S. ex rel. Siller*, 21 F.3d at 1349; *compare U.S. ex rel. Kreindler*, 985 F.2d at 1158 and *U.S. ex rel. Doe*, 960 F.2d at 324.

> That the facts that were disclosed [publicly] and the facts that "formed the basis for" Siller's action were the same does not, however, mean that Siller actually derived his allegations from the [publicly disclosed] allegations.

Id. at 1349. "Actually" is defined by *Webster's New Collegiate Dictionary* (1981) ("Webster's") as "in act or in fact".[18] Webster's defines "to derive" as "to take from a specific source."[19] The publicly disclosed allegations of defects cannot be the "specific source" from which LeBlanc "took" his allegations of fraud because the public allegations of defects are devoid of any allegations of Raytheon's fraud: in all of the voluminous materials constituting the public debate about Patriot's performance, there is no mention anywhere that (i) Raytheon committed fraud; (ii) Raytheon violated the testing requirements in its contracts; or (iii) Raytheon knew or recklessly disregarded that the Patriot was defective. LeBlanc was the first to so allege, and the district court's conclusion that LeBlanc's action was "based upon" public disclosures must be reversed.

II. THE COURT OF APPEALS' SUMMARY AFFIRMATION OF THE DISTRICT COURT'S INTERPRETATION OF § 3730(e)(4)(A) OF THE FALSE CLAIMS ACT IS A DECISION ON AN IMPORTANT QUESTION OF FEDERAL LAW AND THIS COURT SHOULD RESOLVE THE CONFLICT AMONG THE CIRCUITS AS TO THE SCOPE OF THE JURISDICTIONAL BAR IN *Qui Tam* ACTIONS.

In summarily affirming the district court's decision, the First Circuit has decided an important question of federal law which has not been, but should be, settled by this Court: What is the scope of the *qui tam* provisions of the FCA? The court of appeals in this case has answered this question by affirming the

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[18] *Webster's*, p. 12, *actually* definition 1.

[19] *Id.*, p. 303, *derive* definition 1a.

district court's ruling that only those *qui tam* plaintiffs with "direct and independent" knowledge of fraud may be permitted to proceed. App., *infra*, pp. 9A-10A. This broad reading of the bar is contrary to the holding of every other court of appeals to have decided this issue, and improperly would change the "original source" exception to the bar (logically the third step in the analysis)[20] into the first threshold to be crossed. Unless this Court settles this question, the manifest legislative intent behind the 1986 amendments to encourage more *qui tam* suits will be defeated.[21]

The original *qui tam* provisions of the FCA contained no jurisdictional limitations and did not preclude plaintiffs from bringing suit on the basis of information already in the government's possession. *U.S. ex rel. Springfield Terminal Ry.*, 14 F.3d at 649. Despite this invitation for abuse, however, the provisions were used sparingly in the first fifty years of their existence. *U.S. ex rel. LaValley*, 707 F.Supp. at 1354. During World War II, government contracts came under scrutiny by increasing numbers of FCA *qui tam* lawsuits. The need for some type of restriction on *qui tam* suits was evident in 1943, when this Court allowed a relator to proceed with his action even though he "contributed nothing to the discovery of this crime." *U.S. ex rel. Marcus*, 317 U.S. at 545, 63 S.Ct. at 384. In response, the 1943 amendments to the FCA precluded all *qui tam* actions "based on evidence or information the government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded).

During the following forty years, the courts interpreted strictly the jurisdictional bar and the *qui tam* provisions of the

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[20] (1) Has there been a public disclosure; if so, (2) did the plaintiff base his action on the public disclosure; and, if so, (3) is the plaintiff an original source? *U.S. ex rel. LaValley*, 707 F.Supp. at 1366.

[21] *See* S. Rep. No. 345, 99th Cong., 2nd Sess., reprinted in 1986 U.S.C.C.A.N. at 5288.

FCA fell into disuse. It was apparent that the 1943 amendments were too restrictive ex *U.S. in rel. State of Wisconsin* v. *Dean*, 729 F.2d 1100 (7th Cir. 1984), in which the State of Wisconsin brought a *qui tam* action on behalf of the U.S. government. The case was barred because Wisconsin, pursuant to federal regulations, had reported the fraud to the government before it brought the FCA action. *Id.* at 1108. The Seventh Circuit found that the action was based on information which the government already had and barred the suit even though Wisconsin was the original (and only) source of the information. *Id.*

The purpose of the False Claims Amendment Act of 1986 was to enhance the government's ability to recover losses from fraud. S. Rep. No. 345, 99th Cong., 2d Sess., *reprinted in* 1986 U.S.C.C.A.N. at 5266. In 1985, the Department of Defense Inspector General, Joseph Sherick, testified that 45 of the 100 largest defense contractors, including 9 of the top 10, were under investigation for multiple fraud offenses. *Id.* at 2, 5267. Estimates of government fraud from those who have studied the issue, including the General Accounting Office, Department of Justice, and Inspectors General, range from hundreds of millions of dollars to more than fifty billion dollars per year. *Id.* at 3, 5267. The restrictive interpretations of the act which emerged after the 1943 amendments were considered to "thwart the effectiveness of the statute." *Id.* The 1986 revisions were aimed at correcting these restrictive interpretations in order to make the FCA a more effective weapon against government fraud. *Id.*; *see U.S. ex rel. State of Wisconsin*, 729 F.2d at 1104-6.

The court of appeals in the present case, however, has reverted to the pre-1986 interpretation of the jurisdictional bar by summarily affirming the district court's decision to bar this suit. The district court ruled that a public disclosure within the meaning of the statute occurred upon the public disclosure of allegations of defects in Patriot. App., *infra*, p. 10A. In addi-

tion to being in conflict with the current decisions of the other circuits, this ruling frustrates Congressional intent by effectively precluding all *qui tam* suits seeking to prosecute fraud on the part of any manufacturer whose products have been called defective. This illogical holding provides all government contractors with a complete pre-emptive defense against any potential *qui tam* plaintiff: the contractor need only to publish anonymously in any newspaper a list of possible defects in its product before sale to the government. The 1986 amendments sought to eliminate the possibility of fraud with such impunity and the courts' decisions in this case frustrate that intent.

Conclusion

For the foregoing reasons, petitioner LeBlanc respectfully requests that this Court grant a writ of certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

ROBERT DOUGLAS CITY
BBO #084360
Counsel of Record
PHILIP DI DOMENICO
CITY, HAYES, MEAGHER & DISSETTE, P.C.
50 Congress Street
Boston, Massachusetts 02109
(617) 523-3050

Attorneys for Petitioner
Roland A. LeBlanc

November 7, 1995

Appendix Table of Contents

APPENDIX A

Opinion of the United States Court of Appeals for the First Circuit 1A

APPENDIX B

Opinion of the United States District Court for the District of Massachusetts 3A

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1263

UNITED STATES OF AMERICA EX REL.
RONALD A. LEBLANC,
PLAINTIFF-APPELLANT,

v.

RAYTHEON COMPANY, INC.,
DEFENDANT-APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Reginald C. Lindsay, *U.S. District Judge*]

Before
Selya and Boudin, *Circuit Judges*,
and Lisi*, *District Judge*.

Robert D. City, with whom *Philip di Domenico* and *City, Hayes, Meagher & Dissette, P.C.* were on brief, for appellant.
Martin J. Newhouse, with whom *Theodore M. Hess-Mahan* and *Ropes & Gray* were on brief, for appellee.

AUGUST 9, 1995

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* Of the District of Rhode Island, sitting by designation.

SELYA, *Circuit Judge*. This appeal stems from a so-called *qui tam* action brought under the False Claims Act, 31 U.S.C. § 3730 (1988). The defendant moved, early on, to dismiss for want of subject matter jurisdiction. *See* Fed. R. Civ. P. 12(b)(1). The court below granted the motion, writing a careful, well-reasoned opinion that correctly analyzed and applied the relevant doctrines. *See United States ex rel. LeBlanc* v. *Raytheon Co.*, 874 F.Supp. 35 (D.Mass. 1995).

It is our preferred practice that when, as now, "a trial court has produced a first-rate work product, a reviewing tribunal should hesitate to wax longiloquent simply to hear its own words resonate." *In re San Juan Dupont Plaza Hotel Fire Litig.*, 989 F.2d 36, 38 (1st Cir. 1993). That wise adage is fully applicable here. Accordingly, we affirm the order of dismissal for substantially the reasons elucidated in the opinion below.

We need go no further. The judgment of the district court is summarily affirmed. *See* 1st Cir. R. 27.1.

Affirmed.

APPENDIX B.

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

United States of America
ex rel. Ronald A. LeBlanc
Plaintiff,

v.

Raytheon Company
Defendant

CIVIL ACTION NO.
92-12528-RCL

OPINION

Lindsay, District Judge

Ever since the Persian Gulf War in 1991, a debate has raged about the effectiveness of defensive weaponry known as the Patriot Air Defense Missile System ("the Patriot"). Critics have asserted that numerous defects in the Patriot led to a dismal performance by the weapon during the Persian Gulf War. These critics claim, in addition, that, notwithstanding the Patriot's poor performance, the United States Army and the Patriot's manufacturer, Raytheon Company ("Raytheon"), have made unfounded and exaggerated claims about the success of the Patriot in intercepting and destroying Iraqi Scud missiles during the war.

Into this fray now comes the relator Roland LeBlanc.[1] He has sued Raytheon under the *qui tam* provisions of the False

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[1] LeBlanc's teenage daughter, Theresa M. LeBlanc, originally a co-relator in this action, has been dismissed voluntarily.

Claims Act, 31 U.S.C. § 3730, claiming that Raytheon made false and fraudulent claims to the government concerning the Patriot before, during and after the Persian Gulf War. Raytheon has filed a suggestion of lack of subject matter jurisdiction and a motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure. Pointing to the public debate about the effectiveness of the Patriot, Raytheon claims that the "public disclosure bar" of the False Claims Act strips this Court of jurisdiction to hear LeBlanc's claims.

After a hearing and careful consideration of this matter, the Court concludes that this action is precluded by the public disclosure bar of the False Claims Act.

I. Factual Allegations.

Once a defendant raises the issue of a district court's subject matter jurisdiction over a dispute, the plaintiff has the burden of establishing that such jurisdiction exists. *Media Duplication Services* v. *HDG Software*, 928 F.2d 1228, 1235 (1st Cir. 1991). On a motion attacking subject matter jurisdiction, the allegations of the complaint will not be cloaked with a presumption of truth, as they are on a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *Id. See also Espinosa* v. *DeVasto*, 818 F.Supp. 438, 440 (D. Mass. 1993).

The allegations of LeBlanc's amended complaint[2] are nonetheless essential to a determination of whether there is subject matter jurisdiction under the provisions of the False Claims Act. As will be discussed below, the Court must determine whether LeBlanc based his claims on "allegations or transactions" which had previously been publicly disclosed. If so (and if LeBlanc was not an "original source" as defined by the statute), then this Court may not serve as a forum for this action.

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[2] LeBlanc filed the original complaint under seal on October 20, 1992. He filed his amended complaint, as of right, on July 13, 1993, also under seal. The Court granted LeBlanc's motion to unseal the amended complaint on January 31, 1994. The amended complaint was served on Raytheon on May 27, 1994.

The substance of LeBlanc's amended complaint is as follows:

Raytheon designs, develops, manufactures and sells the Patriot and other military equipment under contracts with the United States and its Department of Defense. The contracts incorporate extensive specifications, standards and guidelines. The government has paid Raytheon billions of dollars under the contracts from the early to mid-1980s to the present to develop, produce, test and sell the Patriot. By mid-1992, the government had ordered about 8,000 Patriots.

Raytheon was required, in every aspect of producing the Patriot, to adhere strictly to all terms of the contracts for the production of the weapon. Extensive requirements applied to design, manufacture, record keeping, inspection, testing, quality control, and identification and correction of deficiencies. Various military specifications, including, without limitation, Military Specification MIL-Q-9858A, governed performance of the contract.

LeBlanc alleges that Raytheon failed to comply with many contractual requirements, including MIL-Q-9858A, but nonetheless applied inspection stamps to process sheets and otherwise indicated compliance with applicable specifications. He also alleges that Raytheon fabricated records and statements, thus causing false claims to be presented to, and approved and paid by, the United States

LeBlanc claims that Raytheon's violation of its contractual obligations resulted in nonconforming Patriots that malfunctioned during the Persian Gulf War. He alleges nearly a dozen specific defects and contends that Patriots were lost, failed to defend against Iraqi Scud missiles, and allowed and caused property damage, injuries and deaths.

LeBlanc alleges, in addition, that during and after the war, Raytheon made false claims and misrepresentations to the government about the effectiveness of the Patriot. He says that Raytheon claimed almost total success against Iraqi missiles

in Saudi Arabia, whereas evidence suggests just the opposite: that the system was almost totally ineffective. He says that Raytheon "knew or should have known" that the Patriot did not and could not have performed as well as claimed, and that, in fact, Raytheon has conspired to cover up the Patriot's failures. After making these inflated claims, Raytheon, LeBlanc charges, sold billions of dollars worth of Patriots.

To support his allegations of Raytheon's false claims concerning the Patriot, LeBlanc quotes in his amended complaint public statements from two knowledgeable persons. U.S. Representative John Conyers, Jr., then Chairman of the House Government Operations Committee and of the Legislation and National Security Subcommittee, is quoted as saying:

> [T]he Patriot's supposedly near-flawless performance may be one of the greatest myths in weapons history . . . We know now that the public and the Congress were misled by definitive statements of success issued by . . . representatives of Raytheon, the Patriot's prime contractor, during and after the war [and that] only 9 percent of Patriot Scud engagements are supported by the strongest evidence that an engagement resulted in a warhead kill . . . [W]e found a pattern of misleading claims and poorly evaluated evidence . . . The misinformation supplied by . . . Raytheon has given the American people and Congress profoundly mistaken impressions about the Patriot . . . [A]ssessments [of Patriot success rates] were performed by people with a vested interest in the program . . . [including people] from Raytheon, the Prime Contractor on the program . . . [S]oldiers' lives could be unnecessarily endangered . . . They may depend on Patriot battalions destroying nine out of ten missiles . . . when the actual capabilities are closer to one out of ten, if that.

LeBlanc also quotes Theodore Postol, whom he describes as "an eminent Professor of Science, Technology and National Security at M.I.T.":

> [Records] reveal substantial discrepancies between the claims of high Patriot performance asserted by Stein [a Raytheon executive] and . . . video evidence that indicates Patriot was almost a total failure at intercepting Scud warheads during the Gulf War. . . . [I]nappropriate attempts have been made to silence the debate over Patriot's Gulf War performance.

II. The Law

A. The "Public Disclosure" Jurisdictional Bar

The *qui tam* provision of the False Claims Act, allows a private person to file a civil action, in the name of the United States, against individuals or entities that have violated the substantive provisions of the Act.[3] The current battle focuses on the "public disclosure" jurisdictional bar to such private actions, contained in 31 U.S.C. § 3730(e)(4). The public disclosure jurisdictional bar is framed as follows:

> (4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, admin-

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[3] "*Qui tam*" is short for "*qui tam pro domino rege quam pro seipso*," which means "he who as much for the king as for himself." *U.S. ex rel. S. Prawer and Co. v. Fleet Bank*, 24 F.3d 320, 324 n.7 (1st Cir. 1994). *Qui tam* provisions were first enacted in thirteenth century England as a supplement to ineffective law enforcement. *Id.* The First Circuit, in the *Fleet Bank* case, provides an illuminating history of the *qui tam* provisions of the False Claims Act, including two significant Congressional thrusts and parries following controversial judicial interpretations of the statute. *Id.* at 324-26.

> istrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

As is readily apparent from LeBlanc's quotation of Representative Conyers and Professor Postol, Raytheon's alleged misrepresentations regarding the effectiveness of the Patriot had already been publicly aired by the time LeBlanc filed his amended complaint.[4]

But what of disclosure concerning the specific defects of the Patriot? In an attachment to its memorandum in support of its suggestion of lack of jurisdiction, Raytheon has lined up LeBlanc's allegations of Patriot defects against public statements criticizing the Patriot, the government and Raytheon. These statements were either made in a congressional hearing on the performance of the Patriot, in published articles or in a report of the General Accounting Office. The lineup shows that *every* defect and failure of the Patriot alleged by LeBlanc in the amended complaint had been disclosed publicly before the present action was filed.

At the hearing on the suggestion of lack of jurisdiction and motion to dismiss, LeBlanc's counsel conceded that all of the

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[4] The statements of Representative Conyers, in particular, are noteworthy. He refers to "misleading claims" of, and to "misinformation supplied by," Raytheon — this in an article entitled "The Patriots Myth: Caveat Emptor." *Arms Control Today*, November 1972 [*sic*]. The article featured an inset, highlighting, under the caption "False Claims," alleged misstatements about the Patriot by Raytheon and the United States government.

defects of the Patriot alleged in the amended complaint had been previously disclosed publicly. He conceded as well that, before this case was commenced, there had been allegations that Raytheon had exaggerated the Patriot's success. In each instance the concession was ineluctable.

LeBlanc argues, however, that one allegation — that Raytheon had failed to comply with MIL-Q-9858A — had not been previously disclosed, and that his inclusion in the complaint of that claim (considered crucial by him to the case for wrongdoing by Raytheon) is sufficient to catapult him over the public disclosure bar. Raytheon, for its part, conceded at the hearing that the specific allegation that Raytheon had failed to comply with MIL-Q-9858A, to its knowledge, had not been publicly made before the amended complaint was filed.

LeBlanc claims to have special knowledge of government contracting procedures and requirements deriving from his previous work at Raytheon and his work with military contracts as a government employee. He argues that this special knowledge gave him the ability to interpret the previously disclosed information about Raytheon's conduct and to conclude that Raytheon must have failed to comply with MIL-Q-9858A. But special expertise is not good enough to get a relator past the jurisdictional bar. "[T]he relator must possess substantive information about the particular fraud, rather than merely background information which enables a putative relator to understand the significance of a publicly disclosed transaction or allegation." *U.S. ex rel. Stinson* v. *Prudential Ins.*, 944 F.2d 1149, 1160 (3d Cir. 1991).

> [T]here may be situations in which all of the critical elements of fraud have been publicly disclosed, but in a form not accessible to most people, *i.e.*, engineering blueprints on file with a public agency. Expertise in the field of engineering would not in itself

> give a *qui tam* plaintiff the basis for suit when all the material elements of fraud are publicly available, though not readily comprehensible to nonexperts.

U.S. ex rel. Springfield Terminal Railway v. *Quinn*, 14 F.3d 645, 655 (D.C. Cir. 1994). LeBlanc has not come forward with previously undisclosed substantive information about Raytheon's alleged duplicity concerning the Patriot. Rather, he has deduced contract violations from his previous experience and from the public allegations which had already been made. MIL-Q-9858A is a publicly available and generally applicable quality assurance requirement, which is, in the apt phrasing of Raytheon's counsel, "an empty vessel." It requires inspections, testing, and other measures to ensure that the substantive specifications of an underlying project are met. MIL-Q-9858A does not impose any specifications particular to the Patriot. Anyone with knowledge of military procurement contracts could conclude, after reading claims that the Patriot had certain defects affecting its performance, that Raytheon had failed to comply with the requirements of MIL-Q-9858A.[3]

Accordingly, the Court concludes under 31 U.S.C. § 3730, that allegations of the making of false claims by Raytheon had been publicly disclosed as of the time of filing of the amended complaint.

B. "Based Upon"

LeBlanc advanced an alternative argument in his papers opposing the suggestion of lack of jurisdiction and the motion to dismiss. He asserted that, even though he was familiar with publicly disclosed allegations of wrongdoing by Raytheon, he did not base his amended complaint in the present action upon

[3] LeBlanc last worked at Raytheon in 1984. None of his work for Raytheon or the government, however, involved disputed aspects of the Patriot.

those allegations. Instead, he claims, he used those allegations merely as "points of departure" for a full-scale investigation he conducted. The investigation, it appears, consisted largely of speaking to Professor Postol and assembling documents from Professor Postol's files and from other experts on the Patriot. LeBlanc does not contend that he received any "inside" information from Raytheon dealing specifically with the allegations of false claims made in this case or that he actually saw the confidential Patriot specifications.

At the hearing, LeBlanc appeared to abandon his contention that he did not base his complaint on publicly disclosed information, stressing, as noted earlier, that he had provided something new: his conclusion that Raytheon failed to follow MIL-Q-9858A. Because any concession LeBlanc may have made on this point is at best equivocal, it is appropriate that the Court consider LeBlanc's original contention that this case is not "based upon" public information previously disclosed.

There is a dispute among the circuits as to whether the public disclosure bar applies if the relator did not actually base his action on the publicly disclosed allegations. This Court need not resolve this dispute, for under neither interpretation of the public disclosure bar can LeBlanc prevail.

Again, the statute provides that "[n]o court shall have jurisdiction over an action under this section *based upon* the public disclosure of allegations or transactions. . . ." 31 U.S.C. § 3730(e)(4) (emphasis added). Several circuits have ruled that when the allegation of fraud has been publicly disclosed, *qui tam* action is barred regardless of where the relator obtained his information, unless the relator himself or herself is the original source of the information. *U.S. ex rel. Doe* v. *John Doe Corp.*, 960 F.2d 318, 324 (2d Cir. 1992); *U.S. ex rel. Precision Co.* v. *Koch Indus.*, 971 F.2d 548, 552 (10th Cir. 1992), *cert denied*, 113 S.Ct. 1364 (1993); *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992); *Houck on behalf of*

U.S. v. *Folding Carton Admin.*, 881 F.2d 494, 504 (7th Cir. 1989), *cert. denied*, 494 U.S. 1027 (1990). Explaining this view, the Tenth Circuit has stated that "[a]s a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.' In this context, an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless 'based upon' such allegations or transactions." *Koch*, 971 F.2d at 552.

The Fourth Circuit, excepting to the views of the Tenth Circuit, responded: "We are unfamiliar with *any* usage, let alone a common one or a dictionary definition, that suggests that 'based upon' can mean 'supported by.'" *U.S. ex rel. Siller* v. *Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir. 1994), *cert. denied*, 115 S.Ct. 316 (1994) (emphasis in original). The Fourth Circuit rejected the notion that an allegation which is publicly disclosed can bar a *qui tam* action where the disclosure does not form the basis for the action. Citing *Webster's Third New International Dictionary*, the court stated that "based upon" means to "use as a basis for." *Id.* at 1348.

> Rather plainly, therefore, a relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term "based upon," apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s undisputed objective of preventing "parasitic" actions . . . for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

Id. (citation omitted).

Judge Wolf of this district has similarly read the "public disclosure" provision as not barring an action if the plaintiff does not actually base the action on the publicly disclosed allegation or transaction. *U.S. ex rel. LaValley* v. *First Nat. Bank of Boston*, 707 F.Supp. 1351, 1366-67 (D. Mass. 1988). The judge found that the action before him was "based upon the knowledge developed independently by the three original relators. . . ." and allowed the *qui tam* action to proceed, despite the fact that allegations similar to those made by the relators had been previously disclosed to the public. *Id.* at 1367.

In light of the plain meaning of the words "based upon," this Court is inclined to agree with the Fourth Circuit and Judge Wolf. But irrespective of the side of the battle line on which one stands, the public disclosure bar would apply to this action.

If the allegations need only be publicly disclosed in order for the public disclosure bar to apply, then LeBlanc must perforce lose. The Court has already demonstrated that the allegations about Raytheon's conduct with respect to the Patriot had already been publicly revealed.

If LeBlanc had literally to have based his action on the publicly disclosed allegations in order for the public disclosure bar to apply, he would still be out of luck. As noted earlier, he admits to having used the publicly disclosed allegations as "points of departure." What this means is that, but for his review of the publicly disclosed allegations of the Patriot's defects and Raytheon's misinformation, he would not have even known about the possibility of problems with the Patriot or with Raytheon's behavior. In the words of the Fourth Circuit, LeBlanc "actually derived from that disclosure the allegations upon which his *qui tam* action is based." *Siller*, 21 F.3d at 1348.

To hold otherwise would distort the meaning of the statute beyond any reasonable bounds. It would allow any individual to learn of publicly disclosed allegations of wrongdoing, then

go directly to the source of those allegations, have the allegations repeated and then file an action based on this supposedly new and nonpublicly disclosed information. The public disclosure bar is designed, in part, to prevent parasitic lawsuits — actions in which individuals leech off publicly available information in an effort to cash in on the generous awards available under the False Claims Act. *See U.S. ex rel. S. Prawer and Co.* v. *Fleet Bank*, 24 F.3d 324-26 (1st Cir. 1994). LeBlanc's scheme would subvert this objective.[6]

For the foregoing reasons, the Court concludes that it does not have jurisdiction to hear this case, and therefore dismisses the action.[7]

So ordered.

United States District Judge

[6] LeBlanc concedes that he was not an "original source" of the allegations, and he is correct to do so. "Direct and independent knowledge" is a prerequisite for one to qualify as an "original source." 31 U.S.C. § 3730(e)(4)(B). "[W]here one would not have learned of the information but for its public disclosure, one does not have 'direct and indpendent knowledge' of the information." *Wang* v. *FMC Corp.*, 975 F.2d 1412, 1417 (9th Cir. 1992). *See also Houck on Behalf of U.S.* v. *Folding Carton Admin. Committee*, 881 F.2d 494, 505 (7th Cir. 1989); *U.S. ex rel. Stinson* v. *Prudential*, 944 F.2d 1149, 1160 (3d Cir. 1992).

[7] The Court dismisses all of the counts asserted in the amended complaint. LeBlanc's standing flows solely from his status as a *qui tam* plaintiff under 31 U.S.C. § 3730. Because the Court has concluded that the public disclosure bar prevents LeBlanc from proceeding as a *qui tam* plaintiff, all of LeBlanc's claims must be dismissed.

No. 95-867

Supreme Court, U.S.
FILED
JAN 3 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES EX REL. ROLAND A. LEBLANC,

Petitioner,

vs.

RAYTHEON COMPANY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

MARTIN J. NEWHOUSE
Counsel of Record
ROPES & GRAY
Attorneys for Respondent
One International Place
Boston, Massachusetts 02110
(617) 951-7000

8028
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

COUNTER-STATEMENT OF THE QUESTION PRESENTED

The question presented is whether the judgment below dismissing this action for lack of subject matter jurisdiction should be affirmed on the ground that, as the district court found and the First Circuit affirmed, the action is based upon allegations or transactions that have been publicly disclosed within the meaning of the public disclosure bar of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A).

LIST OF ALL PARTIES

Petitioner and respondent are identified in the caption. Raytheon Company has no parent company and has the following nonwholly owned subsidiaries:

Constellation Communications, Inc.
GRAU Automation GmbH and Company
Alliance Logistics LTD
Space Imaging, Inc.
Space Imaging, Ltd.
BSG Schalttechnik G.m.b.H. & Co. K.G.
Arbeitsmedizinische Betreuungsgesellschaft Kieler Betriebe mbH
Anschutz Japan Co. Ltd.
Raytheon Saudi Arabia Limited
Badger-SMAS Ltd.
Shanghai Ebasco - ECEPDI Engineering Corporation
Catalytic Servicios, S.A.
Cosa-United, S.A.
Litwin, S.A.
Hawk Holding, S.A.
Agence Centrale de Produits et D'Equipements S.A.
Litwin Romania S.A.
MYA Badger SNC
Polytec, S.A.R.L.
International Refinery Contractors (IRC) B.V.
International Refinery Contractors (IRC) C.V.
Process Industry Engineering (Pty) Ltd.
Raytheon Engineers & Constructors France S.a.r.L.
Raytheon Engineers & Constructors Italy S.R.l.
Badger Africa (Pty) Ltd.
Rezayat Litwin Company Limited
Secore Services Incorporated
Gibsin Engineers, Ltd.

UME/SMAS
Stearns Catalytic Ingenieria y Construccion Chile Limitada
Systems for Defense
Gesellschaft fuer Verteidigungs Systeme mbH
BSG Schalttechnik G.m.b.H. & Co. K.G.
Standard Missile Company, L.L.C.
Switchcraft Far East Company Ltd.
Thoray Electronics

TABLE OF CONTENTS

	Page
Counter-Statement of the Question Presented	i
List of All Parties	ii
Table of Contents	iv
Table of Citations	iv
Opinions Below	1
Statutory Provision Involved	1
Statement of the Case	2
Reasons for Denying the Writ	5
Conclusion	8

TABLE OF CITATIONS

Cases Cited:

General Talking Pictures Corp. v. Western Elec. Co., 304 U.S. 175 (1938)	7
United States ex rel. Siller v. Becton Dickinson & Co., 21 F.3d 1339 (4th Cir. 1994)	6
United States ex rel. Springfield Terminal Ry. v. Quinn, 14 F.3d 645 (D.C. Cir. 1994)	6

Contents

Page

Statutes Cited:

31 U.S.C. § 3730(e)(4)(A) ..... i, 1, 5, 7

For the reasons set forth below, Raytheon Company ("Raytheon") hereby opposes the Petition ("Petition") of Roland A. LeBlanc ("LeBlanc") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

Contrary to the statement made in the Petition at 1, the district court's opinion is published. It may be found at 874 F. Supp. 35 (D. Mass. 1995). As is stated in the Petition, the opinion of the court of appeals is not published.

STATUTORY PROVISION INVOLVED

The Petition fails to set out verbatim the statutory provision involved, 31 U.S.C. § 3730(e)(4)(A), through the omission of a portion thereof. The provision reads verbatim as follows (the words omitted in the Petition are italicized):

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative *hearing, in a congressional, administrative,* or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

STATEMENT OF THE CASE

Raytheon corrects certain critical inaccuracies and omissions in the Petition as follows:[1]

LeBlanc gives the impression that he spontaneously began an investigation of the Patriot. *See* Petition at 3. In fact, LeBlanc's so-called "investigation" began with publicly disclosed allegations concerning the Patriot's performance in the Gulf War and, as the district court found as a factual matter and the First Circuit affirmed, added nothing to those public disclosures. *See* the decisions of the district court and the First Circuit in Petitioner's Appendix ("Pet. App.") at 1A-14A.

LeBlanc neglects to mention in the Petition that this action was not sparked by "inside" or nonpublic information of any sort, but rather by public allegations in the media and elsewhere concerning the performance of the Patriot in Desert Storm, public disclosures which LeBlanc has admitted were his "points of departure." Pet. App. at 11A. Thus, the public genesis of this lawsuit was conceded by LeBlanc before the district court. *Id.* Yet, conspicuously absent from LeBlanc's rendition of the case in the Petition is the fact — again conceded by him before the district court — that, prior to amending his complaint to include the allegations concerning the Patriot and Raytheon upon which he now relies, he had read and was familiar with public disclosures of precisely those allegations. In fact, the April 7, 1992 Congressional Hearing on the Patriot's performance in the Persian Gulf addressed each and every one of the allegations of failures or inadequacies in the Patriot's performance that are restated by

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1. Raytheon does not attempt to correct all of the errors in LeBlanc's rendition of the facts, nor does it cure all of LeBlanc's omissions. What are discussed are only those points that Raytheon believes have a bearing on the issue of whether the Petition should be granted.

LeBlanc as the basis for this action.[2] As the district court found:

> Raytheon has lined up LeBlanc's allegations of Patriot defects against public statements criticizing the Patriot, the government and Raytheon. These statements were either made in a congressional hearing on the performance of the Patriot, in published articles or in a report of the General Accounting Office. The lineup shows that *every* defect and failure of the Patriot alleged by LeBlanc in the amended complaint had been disclosed publicly before the present action was filed.

Pet. App. at 8A. (Emphasis in the original.) The district court noted further:

> At the hearing on the suggestion of lack of jurisdiction and motion to dismiss, LeBlanc's counsel conceded that all of the defects of the Patriot alleged in the amended complaint had been previously disclosed publicly. He conceded as well that, before this case commenced, there had been allegations that Raytheon had exaggerated the Patriot's success. In each instance the concession was ineluctable.

Pet. App. at 8A-9A.

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2. By its discussion of LeBlanc's allegations against it, Raytheon does not intend to, nor does it concede that those allegations have any validity whatsoever. To the contrary, Raytheon disputes LeBlanc's allegations in their entirety as untrue in every respect.

As to the latter concession by LeBlanc's counsel noted by the district court, that there had been public disclosures of allegations that Raytheon had exaggerated the success of the Patriot, the district court specifically highlighted the fact that LeBlanc actually included in his amended complaint quotations from published articles by then Representative John Conyers and MIT Professor Theodore Postol, thereby admitting that his allegations in this connection were based on public disclosures. Pet. App. at 8A. As the district court also observed, the article by Representative Conyers' from which LeBlanc quoted featured an inset which highlighted alleged misstatements about the Patriot by Raytheon and the Government under the caption "False Claims. " *Id.* at 8A, n. 4.

Nor, finally, does LeBlanc even allude in the Petition to the fact, again as noted by the district court, that he has never seen the classified design specifications for the Patriot. Pet. App. at 11A. Accordingly, LeBlanc does not know, and indeed has never known, whether any of the alleged failures in the Patriot's performance upon which he relies, even if true, would constitute a "defect," since he does not know the Patriot's design requirements. LeBlanc' s claim in the Petition that he has determined that Raytheon did not comply with specifications, *see, e.g.*, Petition at 5, is false, because he admittedly does not have any knowledge of what the Patriot's specifications were.

What LeBlanc has attempted is transparent. First, he has ignored countervailing public opinion and accepted as "true" only the publicly disclosed allegations of Patriot failures and/or performance inadequacies. Second, he has assumed *a priori* that those alleged failures and/or inadequacies in performance are "defects," *i.e.*, that they constitute failures by Raytheon to manufacture the Patriot in compliance with its specifications (which LeBlanc has never seen).

Finally, he has speculated that Raytheon lied about the purported "defects" to the Government. This entire chain of faulty assumptions, however, is grounded entirely in the allegations of Patriot failures and inadequacies that LeBlanc adopted from public debate.

LeBlanc argued before the district court, as he does in the Petition, that he relied on the public disclosures "merely" as "points of departure" for an "investigation" that he conducted. Pet. App. at llA. But, as the district court rightly concluded, his "investigation" added nothing to those public disclosures:

> [LeBlanc's] investigation, it appears, consisted largely of speaking to Professor [Theodore] Postol and assembling documents from Professor Postol's files and from other experts on the Patriot.

Id. The district court noted that "LeBlanc does not contend that he received any 'inside' information from Raytheon." It concluded, as a factual matter, that "LeBlanc has not come forward with previously undisclosed substantive information about Raytheon's alleged duplicity concerning the Patriot." *Id.* at 10A.

REASONS FOR DENYING THE WRIT

LeBlanc asserts that there are two reasons why a writ of certiorari should be granted in this case. First, he argues that the First Circuit's affirmance of the district court's dismissal of his case was in direct conflict with the holdings of "five other circuits" on the applicable rule of law. Petition at 7. Specifically, he attacks the decisions below with regard to the courts' interpretation of the "public disclosure" and "based upon" requirements of the statute. *Id.* at 7- 17. *See* 31 U.S.C. § 3730(e)(4)(A), cited in the Petition at 2.

Second, he claims that the First Circuit's decision "effectively closes the door to all *qui tam* plaintiffs except those who qualify as an 'original source'," thus, according to LeBlanc, permitting the "exception to swallow the rule" and frustrating Congress' "efforts to broaden *qui tam* jurisdiction." Petition at 7; 17-20.

Neither of LeBlanc's arguments for granting the writ has merit. To begin with, LeBlanc's assertion that the decisions by the district court and the First Circuit in this case conflict with other circuits on the applicable rule of law is simply wrong. With respect to the public disclosure requirement of the jurisdictional bar, the courts below applied the very rule of law urged by LeBlanc, namely, that a *qui tam* action is barred if and only if it is based upon prior public disclosures of "either the allegation of fraud or the critical elements of the fraudulent transaction." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 654 (D.C. Cir. 1994). LeBlanc lost below because the district court found *as fact*, and the court of appeals affirmed, that "the allegations of the making of false claims by Raytheon had been publicly disclosed as of the time of the filing of the amended complaint." Pet. App. at 10A.

LeBlanc says that the courts below did not apply the interpretation of "based upon" put forward by the Fourth Circuit in *United States ex rel. Siller v. Becton Dickinson & Co.*, 21 F.3d 1339, 1349 (4th Cir. 1994), Petition at 16, referencing in a footnote the supposedly conflicting interpretation of "based upon" applied by other Circuits. *Id.* at n. 17. But differences among the circuits as to the definition of "based upon" are immaterial to the decision of this action. The district court properly held, and the First Circuit properly affirmed, that LeBlanc's action was "based upon" prior public disclosures under *any* extant definition of the phrase. Pet. App. at 11A-14A. In this connection, the district court stated that it

was inclined to agree with the Fourth Circuit's interpretation now relied upon by LeBlanc, and held that, as *a factual* matter, under the Fourth Circuit's definition "the public disclosure bar would apply to this action." *Id.* at 13A.

Finally, LeBlanc's hyperbolic assertion that the lower courts' dismissal of his action will "effectively preclud[e] all *qui tam* suits seeking to prosecute fraud on the part of any manufacturer whose products have been called defective," Petition at 20, makes no sense. LeBlanc's problem is that, as the district court properly found as a matter of fact and the First Circuit properly affirmed, his action is based entirely on *the public disclosure of allegations concerning the Patriot and Raytheon.* For that reason his suit is barred under the "public disclosure bar" of the False Claims Act, 31 U.S.C. § 3730(e)(4)(A). The dismissal of this action under that provision self-evidently places no limitation upon *qui tam* suits that are not based upon the public disclosure of allegations or transactions.

In sum, the First Circuit did not enunciate a new rule of law or choose among inconsistent versions of any rule of law; it applied established legal principles to the facts of this case. Thus, the Petition presents no issue of law, let alone one that merits review by this Court. *See General Talking Pictures Corp. v. Western Elec. Co.*, 304 U.S. 175, 178 (1938) ("Granting of the writ would not be warranted merely to review the evidence or inferences drawn from it.").

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

MARTIN J. NEWHOUSE
Counsel of Record
ROPES & GRAY
Attorneys for Respondent
One International Place
Boston, Massachusetts 02110
(617) 951-7000